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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JOHN LOUIS PALMER, Defendant and Appellant.	2d Crim. No. B298861 (Super. Ct. No. F000180189001) (San Luis Obispo County)

John Louis Palmer appeals from an order denying his petition to vacate his 1992 second degree murder conviction and obtain resentencing under Senate Bill No. 1437 (S.B. 1437), which went into effect on January 1, 2019. (See Stats. 2018, ch. 1015, § 4.) S.B. 1437 added section 1170.95 to the Penal Code.[1] If a defendant has previously been convicted of murder under the felony-murder rule or the natural and probable consequences doctrine and qualifies for relief under section 1170.95, the statute

[1] All further statutory references are to the Penal Code.

permits the defendant to petition to vacate the conviction and obtain resentencing on any remaining counts.

Appellant was charged with first-degree murder under the felony-murder rule, but pleaded guilty to second-degree murder. The information alleged that the murder had occurred during the commission of robbery and first-degree residential burglary. Appellant pleaded guilty to the burglary. He was sentenced to prison for four years on the burglary and a concurrent term of 15 years to life on the second-degree murder. He remains incarcerated for the murder conviction.

The trial court found that appellant had made a prima facie showing of entitlement to relief under section 1170.95. The statute provides that, if a prima facie showing is made, "the court shall issue an order to show cause" and "hold a hearing to determine whether" appellant is entitled to relief. (§ 1170.95, subds. (c), (d)(1).) Instead of issuing an order to show cause, the trial court denied the petition because it concluded that section 1170.95 is unconstitutional. We conclude that the statute passes constitutional muster. Accordingly, we reverse and remand the matter for further proceedings in accordance with section 1170.95.

Facts

The victim was appellant's grandmother. When appellant was 17 years old, he and an accomplice surreptitiously entered the grandmother's home with the intent of stealing cash inside a metal locker. While appellant was looking for the cash, the grandmother confronted the accomplice. The grandmother and the accomplice "engaged in a physical struggle" during which the accomplice stabbed the grandmother in the chest, killing her.

At the time of sentencing, appellant's counsel stated, "[T]his young man had no intention of harming his grandmother. He had absolutely no motive to harm his grandmother. On prior occasions she had caught him taking her money; she had never reported him. [¶] [¶] The law says he's as guilty as the person who actually committed the murder, and he's being punished for that."

S.B. 1437

"Under the felony-murder rule as it existed prior to Senate Bill 1437, a defendant who intended to commit a specified felony could be convicted of murder for a killing during the felony, or attempted felony, without further examination of his or her mental state. [Citation.] . . . [¶] Independent of the felony-murder rule, the natural and probable consequences doctrine rendered a defendant liable for murder if he or she aided and abetted the commission of a criminal act (a target offense), and a principal in the target offense committed murder (a nontarget offense) that, even if unintended, was a natural and probable consequence of the target offense. [Citation.]" (*People v. Lamoureux* (2019) 42 Cal.App.5th 241, 247-248 (*Lamoureux*).)

In S.B. 1437 the legislature stated, "It is necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) To achieve this goal, S.B. 1437 amended section 189, insofar as it pertains to the felony-murder rule, to add subdivision (e), which provides: "A participant in the perpetration or attempted

perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven: (1) The person was the actual killer. (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (Stats. 2018, ch. 1015, § 3.) S.B. 1437 also amended section 188, which defines "malice," to provide, "Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3); see Stats. 2018, ch. 1015, § 2.)

Section 1170.95, added by S.B. 1437, provides in subdivision (a), "A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when" certain conditions apply. One of the conditions is that "[t]he petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made [by S.B. 1437] effective January 1, 2019."

An Appellate Court Has Upheld
The Constitutionality of Section 1170.95

In November 2019, after the trial court's ruling that section 1170.95 is unconstitutional, the Fourth District, Division One, of the Court of Appeal upheld the constitutionality of section 1170.95 in two cases: *Lamoureux*, *supra*, 42 Cal.App.5th 241, and *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270

(*Gooden*).[2] In each case, Justice O'Rourke filed a dissenting opinion. He concluded that "(Senate Bill No. 1437) is an unconstitutional amendment [without voter approval] to Proposition 7 . . . ." (*Lamoureux*, *supra*, at p. 268 (dis. opn. of O'Rourke, J.); *Gooden*, *supra*, at p. 289 (dis. opn. of O'Rourke, J.).)

Attorney General's Position

In the present case the People, represented by the District Attorney of San Luis Obispo County, are attacking the constitutionality of S.B. 1437. The Attorney General has filed an amicus curiae brief defending its constitutionality. The Attorney General states: "This case is one of many involving a constitutional challenge to S.B. 1437. The Attorney General is aware of over 130 such cases. . . . [T]he Attorney General is providing a uniform defense of the law."

Section 1170.95 Is Constitutional

Proposition 7 and Proposition 115

The People contend that S.B. 1437 "unconstitutionally amended Proposition 7 and Proposition 115."[3] "Proposition 7, commonly known as the Briggs Initiative, increased the punishment for first degree murder from a term of life imprisonment with parole eligibility after seven years to a term of 25 years to life. [Citation.] It increased the punishment for second degree murder from a term of five, six, or seven years to a term of 15 years to life. [Citation.] Further, it amended section

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[2] On February 19, 2020, the California Supreme Court denied review in both cases.

[3] The People filed a motion requesting that we take judicial notice of the ballot pamphlets for Propositions 7 and 115, material concerning the legislative history of S.B 1437, and statutes from 1977 and 1978. We grant the motion.

190.2 to expand the special circumstances under which a person convicted of first degree murder may be punished by death or life imprisonment without the possibility of parole (LWOP). [Citation.] Proposition 7 did not authorize the Legislature to amend or repeal its provisions without voter approval." (*Gooden*, *supra*, 42 Cal.App.5th at p. 278.)

In determining that S.B. 1437 did not amend Proposition 7 without voter approval, the *Gooden* majority reasoned: "[T]he language of Proposition 7 demonstrates the electorate intended the initiative to increase the punishments, or consequences, for persons who have been convicted of murder. Senate Bill 1437 did not address the same subject matter. It did not prohibit what Proposition 7 authorizes by, for example, prohibiting a punishment of 25 years to life for first degree murder or 15 years to life for second degree murder. Nor did it authorize what Proposition 7 prohibits by, for instance, permitting a punishment of less than 25 years for first degree murder or less than 15 years for second degree murder. In short, it did not address punishment at all. Instead, it amended the mental state requirements for murder, which 'is perhaps as close as one might hope to come to a core criminal offense "element."' [Citation.] [¶] Thus, Senate Bill 1437 presents a classic example of legislation that addresses a subject related to, but distinct from, an area addressed by an initiative. [Citations.] The Legislature is free to enact such legislation without voter approval. [Citation.]" (*Gooden*, *supra*, 42 Cal.App.5th at p. 282.)

We agree with the *Gooden* majority. We reject the following interpretation of S.B. 1437 by Justice O'Rourke in his dissenting opinion: "Senate Bill No. 1437 addresses sentencing for first and second degree murder, the very same subject matter

encompassed by Proposition 7, by undoing application of the penalties the voters designated in Proposition 7 to those defendants coming within Senate bill No. 1437's reforms. . . . By narrowing the scope of liability for felony murder and murder under a natural probable consequences theory, the law eliminates all punishment for some defendants whom the Proposition 7 voters had decided should be punished by the specified prison terms." (*Lamoureux*, *supra*, 42 Cal.App.5th at p. 268 (dis. opn. of O'Rourke, J.).)

"Proposition 115, known as the 'Crime Victims Justice Reform Act,' amended section 189, among other statutory and constitutional provisions. It amended section 189 to add kidnapping, train wrecking, and certain sex offenses to the list of predicate offenses giving rise to first degree felony-murder liability. [Citation.] Proposition 115 authorized the Legislature to amend its provisions, but only by a two-thirds vote of each house. [Citation.]" (*Gooden*, *supra*, 42 Cal.App.5th at p. 278.)

In determining that S.B. 1437 did not amend Proposition 115, the *Gooden* majority reasoned: "Because Proposition 115 altered the circumstances under which a person may be liable for murder, Senate Bill 1437—which likewise changed the conditions under which a person may be liable for murder—indisputably addresses a matter related to the subject considered by voters. However, as our Supreme Court has cautioned, that alone does not render the Legislature's actions invalid. [Citation.] Instead, the question we must ask ourselves is whether Senate Bill 1437 addresses a matter that the initiative specifically authorizes or prohibits. [Citation.] [¶] We conclude it does not. Senate Bill 1437 did not augment or restrict the list of predicate felonies on which felony murder may be based, which is the pertinent subject

matter of Proposition 115. It did not address any other conduct which might give rise to a conviction for murder. Instead, it amended the mental state necessary for a person to be liable for murder, a distinct topic not addressed by Proposition 115's text or ballot materials." (*Gooden*, *supra*, 42 Cal.App.5th at p. 287.)

The *Gooden* majority concluded, and we agree: "Here, the voters who approved Proposition 7 and Proposition 115 got, and still have, precisely what they enacted—stronger sentences for persons convicted of murder and first degree felony-murder liability for deaths occurring during the commission or attempted commission of specified felony offenses. By enacting Senate Bill 1437, the Legislature has neither undermined these initiatives nor impinged upon the will of the voters who passed them." (*Gooden*, *supra*, 42 Cal.App.5th at p. 289.)

The People argue, "[A]fter the opinions in *Lamoureux* and *Gooden* were issued, the California Supreme Court decided *People v. Guzman* [(2019) 8 Cal.5th 673] which expressed conclusions in direct conflict with the rationale used by the *Gooden* majority to erroneously uphold the lawfulness of S.B. 1437." In *Guzman*, *supra*, 8 Cal.5th 673, the court held that, "to the extent section 632(d) [excluding surreptitious recordings of confidential communications] demanded the suppression of relevant evidence in a criminal proceeding, it was abrogated when the voters approved [the 'Right to Truth-in-Evidence' provision of] Proposition 8" in 1982. (*Id.* at p. 677.) The court further held that subsequent amendments and reenactments of section 632 did not revive the exclusionary provision of section 632(d): "Nothing in the language, history, or context of the amendments evinces an intent on the part of the Legislature to render surreptitious recordings once again inadmissible in

criminal proceedings." (*Id.* at p. 677.) *Guzman* does not conflict with the *Gooden* majority's conclusion that S.B. 1437 "has neither undermined [Proposition 7 and Proposition 115] nor impinged upon the will of the voters who passed them." (*Gooden*, *supra*, 42 Cal.App.5th at p. 289.)

Separation of Powers Doctrine

The People maintain that S.B. 1437 violates the separation of powers doctrine because it is "an unconstitutional usurpation of the clemency power vested exclusively in the Governor." We disagree. The *Lamoureux* majority rejected the same argument. It reasoned: "[S]ection 1170.95's interference with the executive's clemency authority, if any, is merely incidental to the main legislative purpose of Senate Bill 1437." (*Lamoureux*, *supra*, 42 Cal.App.5th at p. 256.) That purpose "was not to extend 'an act of grace' to petitioners. [Citations.] Rather, the Legislature's statement of findings and declarations confirms it approved Senate Bill 1437 as part of a broad penal reform effort. The purpose of that undertaking was to ensure our state's murder laws 'fairly address[ ] the culpability of the individual and assist[ ] in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual.' [Citations.] [¶] The outcome of a successful petition under section 1170.95 . . . underscores the fact that section 1170.95 is not merely an act of grace akin to an exercise of executive clemency. . . . '[A] successful Senate Bill 1437 petitioner's criminal culpability does not simply evaporate; a meritorious section 1170.95 petition is not a get-out-of-jail free card. Instead, the petitioner is resentenced on the remaining convictions. If the murder was charged "generically" and the target offense was not charged, the murder conviction must be

redesignated as the target offense or underlying felony for resentencing purposes.' [Citation.]" (*Id.* at pp. 255-256.)

The People argue that S.B. 1437 unconstitutionally invades the judicial power because it subverts judgments of conviction that became final before S.B. 1437 took effect. We reject this argument for the reasons explained in *Lamoureux*, *supra*, 42 Cal.App.5th at pp. 257-264.

Proposition 9 (Victims' Bill of Rights)

Finally, the People claim that section 1170.95 violates Proposition 9, "commonly known as the 'Victims' Bill of Rights Act of 2008: Marsy's Law,'" which was approved by voters at the general election in November 2008. (*People v. DeLeon* (2017) 3 Cal.5th 640, 648.) "Article I, section 28 of the [state] Constitution, as amended by Proposition 9, . . . provides for a broad spectrum of victim's rights . . . ." (*In re Scott H.* (2013) 221 Cal.App.4th 515, 522.) For the reasons stated in *Lamoureux*, *supra*, 42 Cal.App.5th at pp. 264-266, section 1170.95 does not violate Proposition 9.

Lamoureux does not discuss Proposition 9's amendment of article 1, section 28 to add subdivision (f)(5), which states in relevant part: "Truth in Sentencing. Sentences that are individually imposed upon convicted criminal wrongdoers based upon the facts and circumstances surrounding their cases shall be carried out in compliance with the courts' sentencing orders, and *shall not be substantially diminished by early release policies intended to alleviate overcrowding in custodial facilities*." (Italics added.) The People argue that the italicized language conflicts with the stated purpose of S.B. 1437 "to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and *assists in the*

reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual." (Stats. 2018, ch. 1015, § 1, subd. (e).)

We do not perceive a conflict between the two provisions. S.B. 1437 does not create an "early release polic[y] intended to alleviate overcrowding in custodial facilities." (Cal. Const., art. 1, § 28, subd. (f)(5).) S.B. 1437 has nothing to do with "early release." It is a penal reform measure designed "to more equitably sentence offenders in accordance with their involvement in homicides." (Stats. 2018, ch. 1015, § 1, subd. (b).)

Disposition

The order denying appellant's petition is reversed. The matter is remanded to the trial court with directions to issue an order to show cause and set the matter for a hearing pursuant to section 1170.95, subdivisions (c) and (d)(1).

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Timothy S. Covello, Judge

Superior Court County of San Luis Obispo

Mark R. Feeser, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Thomas S. Patterson, Senior Assistant Attorney General, Tamar Pachter, Supervising Deputy Attorney General, Nelson R. Richards, Deputy Attorney General as amicus curiae on behalf of Appellant.

Dan Dow, District Attorney, Christopher G. Peuvrelle, Melissa Chabra, Deputy District Attorneys, for Plaintiff and Respondent.